No. 82-1130

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH M. SIVIGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that an "unqualified" motion for a remand to the district court, made for the purpose of presenting a motion for a new trial under Fed. R. Crim. P. 33, operated as an abandonment of petitioner's direct appeal from his conviction and divested the court of appeals of jurisdiction to hear the direct appeal following the district court's denial of petitioner's motion for a new trial.

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OPINIONS BELOW

The opinions of the panel of the court of appeals (Pet. App. A-1 to A-12) and the en banc court (Pet. App. B-1 to B-23) are reported at 686 F.2d 832.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on June 23, 1982. A second petition for rehearing was denied on September 10, 1982 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed on November 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury retrial[1] in the United States District Court for the District of New Mexico, petitioner was convicted on three counts of transporting stolen motor vehicles, in violation of 18 U.S.C. 2313, two counts of receiving stolen vehicles, in violation of 18 U.S.C. 2313, and one count of conspiring to receive, transport and conceal such vehicles, in violation of 18 U.S.C. 371 (Pet. App. A-2). He was sentenced to five years' imprisonment on the conspiracy count and three years' imprisonment on each of the substantive counts, all the terms to run concurrently.

1. Following his conviction, petitioner filed a direct appeal (No. 79-1004, 10th Cir.). After the case had been briefed and set for argument, however, he filed a motion to remand the case to the district court (Pet. App. B-4). In his motion, petitioner stated that he intended to file with the district court a motion for dismissal of the charges or, in the alternative, a motion for a new trial based on newly-discovered evidence (*id.* at B-15 n.5). On September 7, 1979, a single judge of the court of appeals granted the motion and remanded the case to the district court (*id.* at B-21 to B-22 n.6).

2. On remand, the district court denied petitioner's motion for a new trial. Petitioner then took an appeal from that order (No. 79-2180, 10th Cir.). Simultaneously, petitioner filed an amended notice of appeal in No. 79-1004, in which he attempted to revive the issues he had presented in his initial direct appeal. A panel of the court of appeals affirmed the district court's order denying petitioner's new trial motion (Pet. App. A-6). However, the panel held sua sponte that it lacked jurisdiction to address the questions

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[1]The court of appeals reversed petitioner's conviction following his first trial (see Pet. App. A-3).

raised by petitioner's direct appeal in No. 79-1004. The panel reasoned that, although it was "absolutely clear * * * that [petitioner] did not intend that his remand motion * * * foreclose his future appeal on the merits," the motion was by its terms "unconditional," and the order granting the motion thus terminated the court's jurisdiction over the direct appeal (Pet. App. A-10 to A-11).

3. On rehearing en banc, the court adhered to the ruling of the panel (Pet. App. B-1 to B-23). Stating that petitioner's remand motion, "in practical effect, constituted an abandonment of any appeal going to the merits of his conviction," the court held that its unqualified remand of the case on the basis of that motion operated to divest the court of jusisdiction over the direct appeal (*id.* at B-6 to B-7). The en banc court observed, nevertheless, that examination of the merits of the claims presented in the direct appeal clearly indicated "that [petitioner's] grounds for reversal are unsubstantial" (*id.* at B-7).

Judges Holloway and Logan dissented from the court's dismissal of the direct appeal (Pet. App. B-10 to B-23). First, the dissent observed that there was no direct authority for the proposition that entertainment of a renewed appeal challenging the underlying conviction following remand for a new trial motion is foreclosed unless the remand motion is explicitly worded so as to make it clear that the remand request is limited and not unconditional. Second, the dissent reasoned that, in any event, petitioner's motion could not be read as intending to ask for dismissal or outright abandonment of his original appeal. In the view of the dissenters, the application to petitioner's case of the court's procedural rule requiring that a motion to remand clearly indicate its qualified nature "unjustly defeats consideration of a criminal appeal on its merits" (Pet. App. B-11).

ARGUMENT

We agree with petitioner that the reasoning of the court of appeals is erroneous. Nevertheless, in the circumstances of this particular case, we question the need for this Court's intervention.

1.a. Fed. R. Crim. P. 33 provides, in part, that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case." While the rule circumscribes the granting of a new trial motion, it does not specify the procedure to be followed for making and hearing such a motion while the case is pending on appeal. In the absence of clear guidance in the language of the rule itself, the courts of appeals generally have required the defendant initially to move for a new trial in the district court. That court has at least two choices when presented with such a motion. First, it may deny the motion, in which case any appeal from that denial may be consolidated with the pending appeal on the merits. Alternatively, the district court may decide that it would grant the motion if it had jurisdiction to do so. In such circumstances, the district court issues a certificate advising the court of appeals that it would grant the motion for a new trial if the case were remanded to it for that purpose.[2] The defendant then moves the court of appeals to remand the case to the district court so that it may grant the new trial motion. See, *e.g.*, *United States* v. *Blanton*, 697 F.2d 146 (6th Cir. 1983); *United*

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[2]The Sixth Circuit held in *United States* v. *Blanton*, 697 F.2d 146, 148 (6th Cir. 1983), that the district court has a third option of "declin[ing] to rule with finality on the motion until after the appeal is concluded." This option is not relevant to the instant case.

States v. *Phillips*, 558 F.2d 363 (6th Cir. 1977); *United States* v. *Frame*, 454 F.2d 1136, 1138 (9th Cir.), cert. denied, 406 U.S. 925 (1972).[3]

Alternatively, the Fifth Circuit permits a defendant first to seek a remand from the court of appeals to enable the district court to entertain a new trial motion. See *United States* v. *Fuentes-Lozano*, 580 F.2d 724 (1978). Following the district court's denial of the defendant's new trial motion in that case, the Fifth Circuit heard and decided the defendant's direct appeal under the same docket number originally assigned to it. *United States* v. *Fuentes-Lozano*, 600 F.2d 552 (1979). In neither opinion was it even suggested that the remand from the court of appeals operated to divest that court of jurisdiction over the direct appeal for all time.[4] Cf. *United States* v. *Butler*, 636 F.2d 727, 729 n.** (D.C. Cir. 1980), in which the court permitted the defendant to withdraw his original brief in order to file a motion for a new trial with the district court. Following the denial of that

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[3]As explained by the Ninth Circuit in *Frame*, it appears to have been the intent of the drafters of Rule 33 that a new trial motion be made in the district court in the first instance. This conclusion follows from a comparison of Rule 33 with its predecessor, which "provided that a motion for new trial could be 'entertain[ed]' by a trial court 'only on remand of the case by the appellate court for that purpose.' Rule II(3), 292 U.S. 662 (1934)" (454 F.2d at 1137 n.1). The new language of the rule was " 'intended to change the existing practice pursuant to which a remand of the case from the appellate court must be secured before the motion for a new trial is made in the trial court. * * * This course will eliminate the need of a remand in those cases in which the trial court determines to deny a motion for a new trial' Fed. R. Crim. P., p. 131 (2d Prelim. Draft 1944)" (454 F.2d at 1138 n.2).

[4]It is true that the defendant in *Fuentes-Lozano* specifically requested a "temporary remand" (580 F.2d at 725), but, for the reasons discussed below, we do not think the exact phrasing of the defendant's motion should necessarily be controlling. In any event, the Fifth Circuit treated Fuentes-Lozano's motion as though it were "without qualification" (*ibid.*).

motion, the court of appeals consolidated the defendant's appeal from the denial of the new trial motion with his earlier direct appeal, without suggesting that it had ever lost jurisdiction over the direct appeal.

In our view, it makes little difference which procedure is followed, and the choice may appropriately be left to each court of appeals to decide for itself.[5] We suggest, however, that in the absence of a clear and unambiguous indication that the defendant actually intends to abandon his direct appeal in favor of the new trial motion, a remand from the court of appeals should be construed as a limited relinquishment of jurisdiction for the purpose of allowing the district court to consider the new trial motion; absent clear evidence to the contrary, the remand should be interpreted as preserving the court of appeals' jurisdiction over the direct appeal in the event the district court denies the new trial motion. Thus, in the case of a circuit that permits the remand motion to be filed initially in the court of appeals, that court should hold the case in abeyance pending the trial court's determination whether it would grant or deny the motion for a new trial. See *United States* v. *Smith*, 331 F.2d 145, 146 (6th Cir. 1964).[6]

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[5]As noted, however (see page 5 note 3, *supra*), it appears that the drafters of Rule 33 intended a defendant to present his motion initially to the district court.

[6]We recognize, as did the court below (Pet. App. A-10 to A-11, B-8), that an "unqualified" remand ordinarily operates to divest the court of appeals of all jurisdiction. It is unquestioned, however, that an appellate court has the authority to order a limited remand while retaining jurisdiction over the case. See, *e.g.*, *United States* v. *Adams*, 73 U.S. (6 Wall.) 101 (1868); *Beck* v. *Federal Land Bank*, 146 F.2d 623, 624 (8th Cir. 1945). Accordingly, in light of the fundamental importance of a defendant's right to appeal, cf. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), we suggest that a remand order in cases such as this should be given a construction that operates in favor of preserving the direct appeal unless there is clear evidence that a contrary result was intended by the defendant.

b. In this case, the panel found that it was "absolutely clear" (Pet. App. A-11) that petitioner did not intend to abandon his direct appeal when he sought a remand for purposes of making a new trial motion. Sitting en banc, however, the court construed the motion for remand as an "abandonment" of the direct appeal (Pet. App. B-6 to B-7). We agree with the dissenting opinion (Pet. App. B-14 to B-18) that petitioner's motion cannot fairly be construed as an abandonment of his direct appeal and that the majority erred in effectively converting a motion to remand into a motion to dismiss. Similarly, the court's order granting the motion to remand cannot fairly be interpreted as dismissing the appeal (Pet. App. B-21 & n.6).

Nevertheless, it seems abundantly clear that petitioner suffered no prejudice from the court's decision in this case. Even though the court of appeals held that it lacked jurisdiction over petitioner's direct appeal, it nevertheless examined the issues petitioner raised in that appeal and observed that "his grounds for reversal are unsubstantial" (Pet. App. B-7). Since this determination was made by a majority of the en banc court, there is no reason to believe that petitioner would fare any better if his case were remanded to the court of appeals for direct consideration.

Equally important, petitioner's initial notice of appeal in No. 79-1004 (the direct appeal) was untimely. Petitioner conceded this point in the court of appeals (see 79-1004 Appellant's Br. Concerning Jurisdiction 2 (10th Cir. filed Jan. 21, 1981), and acknowledged that the timely filing of a notice of appeal is jurisdictional (*ibid.*). Nevertheless, petitioner sought to have his untimely filing overlooked on the ground of excusable neglect. But a finding of excusable neglect must be sought from the district court (Rule 4(b), Fed. R. Crim. P.) and may not, in any event, extend the time limits by more than 30 days (79-1004 Appellant's Br.

Concerning Jurisdiction 2). Petitioner never sought relief from the district court and, at the time of his attempt at showing excusable neglect in the court of appeals, the power of the district court to extend the time limits had long since expired. Thus, the court of appeals could have disposed of petitioner's direct appeal on this basis alone, and petitioner would have no grounds for complaint.

Accordingly, the situation in this case is such that petitioner himself has not been prejudiced by the court of appeals' erroneous ruling. And the decision is unlikely to have any adverse effect on future litigants in the Tenth Circuit because it should now be clear to all defense counsel practicing within that circuit that they should either present their new trial motions to the district courts in the first instance or, should they choose to proceed in the court of appeals initially, phrase their motions for remand in terms that unmistakably indicate their intention to preserve their direct appeal. Under these circumstances, further review by this Court is unnecessary.

2. Petitioner also claims that he was denied the effective assistance of counsel because his lawyer initially sought a remand in the court of appeals rather than moving for a new trial in the district court. Although adoption of the latter course would have prevented the difficulties petitioner later encountered, there is no sound basis for faulting petitioner's counsel. No court had ever held that the grant of an "unqualified" motion for remand would be deemed an abandonment of the direct appeal, and petitioner's counsel cannot fairly be charged with anticipating the court of appeals' decision in this case. The attorney's actions, therefore, did not fall below "the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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